Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ABDUL AZIMI, PETITIONER

v.

JORDAN'S MEATS, INC.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL APPENDIX

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(any footnotes trail end of each document)
Filed 10/7/04
Civil No. 03-268-P-C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDUL W. AZIMI,
Plaintiff

v.

JORDAN'S MEATS, INC.,
Defendant

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Jordan's Meats, Inc. ("Jordan's") moves for summary judgment as to all claims against it in this employment-discrimination action brought by former employee Abdul W. Azimi. See Defendant's Motion for Summary Judgment, etc. ("Defendant's S/J Motion") (Docket No. 8) at 1-2,7; Amended Complaint and Demand for Jury Trial ("Complaint") (Docket No. 22). For the reasons that follow, I recommend that Jordan's motion be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, `material' means that a contested fact has the potential to change the outcome of the suit under the

governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" Navarro v. Pfizer Corp., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1 st Cir.1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. Nicolo v. Philip Morris, Inc., 201 F.3d 29, 33 (1 st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." Triangle Trading Co. v. Robroy Indus., Inc., 200 F.3d 1, 2 (1st Cir.1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." In re Spigel, 260 F.3 d 27, 31 (1 st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Context

The parties' statements of material facts, credited to the extent either admitted or supportedby record citations in accordance with Local Rule 56 and viewed in the light most favorable to Azimi as the non-moving party, reveal the following relevant to this recommended decision:[1]

Azimi was born in Afghanistan and is Muslim. Plaintiff s Additional SMF Par. 1; Deposition of Abdul W. Azimi ("Azimi Dep."), Attachment # 1 to Plaintiff s Opposing SMF, at 8-9, 202. He began working at Jordan's Portland plant in November 1999. Plaintiff's Additional SMF Par. 2; Azimi Dep. at 101.[2]

During his first week of work, Azimi asked a co-worker a work-related question to which the co-worker responded: "You fucking piece of shit." Plaintiff s Additional SMF Par. 4; Azimi Dep. at 102, 109-10.[3] The co-worker did not make such comments to white, non-Muslim employees. Id. Azimi's line leader heard the comment and did nothing. Plaintiff's Additional SMF Par. 5; Azimi Dep. at 110-11. Azimi complained about the incident to Joe Rosario, slicing operations manager, who met with Azimi and the co-worker but took no disciplinary action against the co-worker. Plaintiffs Additional SMF Par. 6; Azimi Dep. at 111-12.

On or about December 7, 1999, Azimi found a letter stuffed into his locker stating: "Hey motherfucker why don't you go back to your own country. You don't belong here you fucking musselum [sic]. You piece of shit. We hate ,you. All the musselums [sic]. You don't belong here at Jordan's Meat. Your [sic] nothing but a fucking nigger. See you soon motherfucker." Plaintiffs Additional SMF Par. 7; Azimi Dep. at 113-14;

handwritten note, Attachment #1 to Investigator's Report, Azimi v. Jordan's Meats, No. E00-0565 (Me. Human Rights Comm'n Jan. 29, 2002) ("Investigator's Report"), Attachment #8 to Plaintiff s Opposing SMF. After Azimi complained about the December 7 letter to his supervisor, Pamela Sprague, and to the director of human resources, Brian Smith, Sprague would send Azimi home first even before employees with less seniority. Plaintiff s Additional SMF Par. 8; Azimi Dep. at 125, 130. When asked why she sent Azimi home first, Sprague responded that her job was to send him home. Plaintiff s Additional SMF Par. 8; Azimi Dep. at 130-31.

Sprague told Azimi, "I know people are picking on you a lot, I'm going to send you to a new line." Plaintiff s Additional SMF Par. 9; Azimi Dep. at 139. She transferred Azimi to a new position. Id. She did not take any action to stop the harassment. Id.

After Azimi reported that he received the December 7 letter, Jordan's distributed a letter on December 13, 1999 to all employees that stated: "An employee who engages or participates in any threats, intimidation, discrimination, or harassment against another employee will be immediately terminated." Plaintiff s Additional SMF Par. 11; Deposition of Brian Smith ("Smith Dep."), Attachment #5 to Plaintiff's Opposing SMF, at 41; Memorandum dated December 13, 1999 from Brian Smith to All Employees Re: Workplace Behavior, Attachment #11 to Plaintiff s Opposing SMF.

After complaining about further harassment by Jessica Libby and Marlene Duncan, Azimi was transferred again, this time to a meat-stripping position. Plaintiff s Additional SMF Par. 16; Azimi Dep. at 154-56. Steve

Mitton was the line leader of the meat-stripping area. Plaintiff s Additional SMF Par. 17; Azimi Dep. at 159, 162. He refused to help Azimi move racks of meat weighing up to 1,000 pounds despite company policy that two emp loyees move the heavy racks. Plaintiff s Additional SMF Par. 17; Azimi Dep. at 159. He also shut off the warm water that Azimi used to warm his hands after handling frozen meat. Plaintiff's Additional SMF Par. 17; Azimi Dep. at 160, 163-64. When Azimi asked him why, Mitton pumped his fist in the air and said, "That's the American way." Plaintiff s Additional SMF Par. 17; Azimi Dep. at 160. Mitton was not disciplined for any of his behavior toward Azimi. Plaintiff s Additional SMF Par. 18; Azimi Dep. at 170.

In early April or late March 2000 a co-worker came up to Azimi and said, "Oh, Abdul, you're here?" Plaintiffs Additional SMF Par. 19; Azimi Dep. at 174. When Azimi asked why she was surprised, she responded that there had been a bomb threat and that everyone working on the line had said that if Azimi was not there that day, he must have made the threat to blow up the building. Id. On August 19, 2000 Patricia Monaghan, slicing line coordinator, told Azimi to do a particular job that he did not have the experience or training to perform. Plaintiff s Additional SMF Par. 20; Azimi Dep. at 186. When he told her that, she pushed him and said, "Go fuck yourself!" Id. Monaghan did not treat her white, non-Muslim co-workers with the same disrespect. Id. Sid Pierce, Monaghan's supervisor, observed the incident and did not discipline Monaghan in any way. Plaintiff s Additional SMF Par. 21; Azimi Dep. at 188-90.

Also on August 19, 2000 Pierce repeatedly ordered Azimi away from one task to relieve other workers, but as soon as Azimi dressed and began working on a new task, harshly ordered him to go to another. Plaintiff s Additional SMF Par. 22; Azimi Dep. at 192-93. This was not done to white, non Muslim co-workers. Id.

After Azimi complained about not being paid meat strippers' pay for stripping meat, Jordan's demoted him to a lower rated job. Plaintiff s Additional SMF Par. 23; Azimi Dep. at 196-97. A white employee replaced Azimi as meat stripper. Id.

In September 2000 Azimi began working with George Libby. Plaintiff's Additional SMF Par. 24; Azimi Dep. at 202. Before September 15, 2000 Azimi told Libby that he was from Afghanistan and was a Muslim. Plaintiff s Additional SMF Par. 25; Azimi Dep. at 202. Libby asked Azimi whether he ate pork. Plaintiff s Additional SMF Par. 26; Azimi Dep. at 202. He repeated the question frequently, sometimes several times a day, laughing when he asked it. Plaintiff s Additional SMF Par. 26; Azimi Dep. at 202-03. When Azimi told him to stop, he laughed even harder. Id. When Azimi told Libby it was against his religion to eat pork, Libby responded, "Fuck you and your God!" Plaintiffs Additional SMF Par. 27; Azimi Dep. at 204.

On September 21, 2000 Azimi's regular supervisor, Russell Cram, was absent. Plaintiff s Additional SMF Par. 29; Azimi Dep. at 206. Azimi reported to his acting supervisor, Stanley Viney, that Libby had tried to force him to eat ham. Id. Viney took no disciplinary action against Libby. Id. Cram was notified of the problem. Plaintiffs Additional SMF Par. 29; Deposition of

Stanley Viney, Attachment #4 to Plaintiff s Opposing SMF, at 13-14.

Approximately three of four days after Libby tried to force Azimi to eat ham, he began asking Azimi on a regular basis, "If you don't eat pork, do you eat pussy?" Plaintiff s Additional SMF Par. 30; Azimi Dep. at 213. Azimi asked Libby to stop, and Libby laughed. Plaintiff s Additional SMF Par. 30; Azimi Dep. at 213-14. Azimi reported the comments to acting supervisor Viney. Id. Viney took no disciplinary action against Libby. Id.

On at least one occasion after September 15, 2000 Libby loudly said to Azimi, "Hey, suck my dick!" Plaintiff s Additional SMF Par. 31; Azimi Dep. at 215. On or about December 15, 2000 Libby came up behind Azimi as Azimi was bent over straightening boxes and grabbed him hard by the waist, thrusting his groin into Azimi's buttocks. Plaintiff s Additional SMF Par. 32; Azimi Dep. at 217-18. Azimi told Libby to get off of him, and Libby laughed. Plaintiff s Additional SMF Par. 32; Azimi Dep. at 218. Sometime before Christmas 2000 Libby told Azimi, "You don't eat pork. You don't eat pussy. But if I ate your girlfriend's pussy she would never go out with you again." Plaintiff's Additional SMF Par. 33; Azimi Dep. at 219. On or about December 26, 2000 Azimi reported Libby's harassmentto Cram, his regular supervisor who had recently returned from medical leave. Plaintiff's Additional SMF Par. 34; Azimi Dep. at 220.

On January 31, 2001 Azimi observed Libby speaking with another co-worker, Phil.[4] Plaintiffs Additional SMF Par. 35; Charge of Discrimination dated February 12, 2001 ("Second Discrimination Charge"), Attachment

#7 to Plaintiff s Opposing SMF, Par. 9. A short time later the phone rang in Azimi's work area. Id. Libby ordinarily answered the phone when it rang, but this time he let it ring repeatedly, so Azimi answered the phone. Id. It was Phil, who said: "Hey Abdul, you fucking nigger, Saddam is waiting for you. Why don't you go back to your fucking country?" Id. Libby started laughing. Id. About ten minutes after Azimi received the first phone, the phone rang again. Plaintiff s Additional SMF Par. 35; Second Discrimination Charge Par. 10. Again, Libby did not answer it and stared at Azimi with a smi rk on his face. Id. Azimi answered the phone and it was Phil, who was singing, "Ab-dul, Ab-dul." Id. Libby started laughing. Id. On February 1, 2001 Azimi complained to Joe Rosario about Libby and Phil. Plaintiffs Additional SMF Par. 35; Second Discrimination Charge Par. 12. Rosario reported the incident to Brian Smith. Id. Libby was later selected for a more favorable position in the company's South Portland facility. Plaintiff s Additional SMF Par. 36; Azimi Dep. at 222.

After Jordan's determined that Libby had harassed Azimi, Azimi was forced to continue working in close quarters with Libby. Plaintiff s Additional SMF Par. 37; Azimi Dep. at 221-22. After Libby left the Portland plant, other incidents occurred. Plaintiff s Additional SMF Par. 38; Azimi Dep. at 230-32, 236, 239, 244-45. One co-worker intentionally made Azimi's working conditions more difficult by making unreasonable demands and holding boxes back on the assembly line and letting them all go at once. Plaintiff s Additional SMF Par. 3 8; Azimi Dep. at 244-45. Another employee made a false claim against him that he was cursing at her and actually followed him to a local store

attempting to incite an argument. Plaintiff's Additional SMF Par. 38; Azimi Dep. at 230-32. Another time Azimi found that one of the pockets of his work jacket, which had been hanging up, had been stuffed with pork. Plaintiff s Additional SMF Par. 38; Azimi Dep. at 236. Another time he found that his shoes had been removed from his locker and placed in the toilet. Plaintiff s Additional SMF Par. 38; Azimi Dep. at 239. On another occasion, a co-worker who had not been doing his job told Azimi, "If you don't fucking like it, why don't you go fucking somewhere else?" Plaintiff s Additional SMF Par. 41; Azimi Dep. at 65.[5]

Jordan's discharged Azimi on November 19, 2001. Plaintiff s Additional SMF Par. 42; Azimi Dep. at 249-50.[6] Azimi fled three administrative complaints with the Maine Human Rights Commission ("MHRC"): a first complaint fled on September 25, 2000 (which alleged harassment during November 1999 -September 2000), a second complaint fled on February 12, 2001 (which alleged harassment during September 2000 - February 2001), and a third complaint fled on May 16, 2002 (which alleged an unlawful termination on November 19, 2001). Defendant's Amended Statement of Material Facts ("Defendant's SMF") (Docket No. 9) Par. 2; Affidavit of Brian A. Smith ("Smith Aff."), attached to Defendant's S/J Motion, Pars. 3.[7] The second complaint was consolidated with the first. Plaintiff s Additional SMF Par. 43; Investigator's Report § III(2). On October 28, 2003 the Equal Employment Opportunity Commission ("EEOC") issued a Notice of Right To Sue to Azimi on his discrimination complaint, Charge No. 16B-2001-00016. Plaintiff s Additional SMF Par. 44; Notice of Right To Sue ("Suit Notice"), Attachment #9 to Plaintiff s Opposing SMF.[8]

III. Analysis

Azimi brings three claims, asserting that Jordan's (i) "deprived [him] of the right of full and equal enjoyment of all benefits, privileges, terms and conditions of the contractual relationship entered into with the Defendant, retaliated against [him] because he complained about and opposed discriminatory employment practices, and otherwise violated [his] rights in violation of 42 U.S.C. § 1981" (First Claim, or "Count I"), Complaint Pars. 71-74, (ii) discriminated against him on the basis of religion, race, ethnicity, nationality and color and retaliated against him in violation of 42 U.S.C. § 2000e-2 (part of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII")) (Second Claim, or "Count II"), see id. Pars. 75-78, and (iii) discriminated against him and retaliated against him on the basis of religion, race, ethnicity, national origin and color in violation of the Maine Human Rights Act ("MHRA"), 5 M.R. S.A. § 4551 et seq. (Third Claim, or "Count III"), see id. Pars. 79-81.

Jordan's articulates five grounds for summary judgment: that (1) although Azimi named "Jordan's Foods, Inc." as defendant, he never worked for that entity, (ii) a portion of Count III (alleging pre-termination harassment) is time-barred pursuant to the applicable MHRA statute of limitations, 5 M.R.S.A. § 4613(2)(C), (iii) a portion of Count I (alleging pre-termination harassment) is time-barred pursuant to the applicable statute of limitations, (iv) Azimi failed to comply with administrative filing and notice requirements with respect to two of his three administrative complaints, as a result of which only one

of those complaints can be considered in connection with Count 11, and (v) for purposes of all three counts, Azimi fails to generate a triable issue as to whether his November 19, 2001 termination was predicated on unlawful discrimination or retaliation. See generally Defendant's S/J Motion.

Two of Jordan's points - the first and third- are readily dispatched. Subsequent to the filing of the instant motion, the court granted a separate motion to amend the complaint to name Jordan's Meats, Inc., rather than Jordan's Foods, Inc., as defendant, see Motion To Amend Complaint (Docket No. 11); Order (Docket No. 20), mooting Jordan's first ground for summary judgment, and Jordan withdrew its third ground (seeking partial summary judgment as to Count 1), see Defendant's Reply to Plaintiff s Response to Defendant's Motion for Summary Judgment ("Defendant's S/J Reply") (Docket No. 18) at 2. 1 therefore focus on the remaining three grounds.

A. MHRA Statute of Limitations

As Jordan's observes, see Defendant's S/J Motion at 3, the Complaint details (i) pretermination harassment and discrimination during the period from November 1999 through February 2001, see Complaint Pars. 5-59, and (ii) retaliatory (and discriminatory) discharge on November 19, 2001, see id. Par. 67. Jordan's posits that inasmuch as the instant complaint was filed on November 18, 2003, see Docket No. 1, all complained-of incidents save the November 19, 2001 termination are barred by the MHRA's two-year statute of limitations, see Defendant's S/J Motion at 3; 5 M.R. S.A. § 4613(2)(C) (providing that an "action shall be

commenced not more than 2 years after the act of unlawful discrimination complained of.").

Azimi rejoins that he alleges a pattern of harassment, and a failure on Jordan's part to take prompt remedial action, continuing through the date of his termination. See Plaintiffs Response to Defendant's Motion for Summary Judgment ("Plaintiff s S/J . Opposition") (Docket No. 12) at 2. He argues that under federal precedent applicable to MHRA claims, the entire chain of incidents is actionable. See id.; see also, e.g., National R.R. Passenger Corp. v. Morgan, 536 U.S. 101,117 (2002) ("Provided that an act contributing to ... [a hostile-work- environment] claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.") (footnote omitted); Crowley v. L.L. Bean, Inc., 303 F.3d 387,395 (1 st Cir. 2002) (same); Reed v. Avian Farms, Inc., 941 F. Supp. 10,13 (D. Me. 1996) (declining defendant's request to hold certain incidents time-barred pursuant to 5 M.R. S.A. § 4613(2)(C) when plaintiff "allege[d] that Defendant's response to Plaintiff s complaint was neither prompt nor remedial and provide[d] sufficient facts which, if believed, could convince the fact finder that Defendant's pattern of harassment of Ms. Reed continued until the day she left the company.").

Jordan's does not take issue with this point of law, but disputes that Azimi's termination properly can be characterized as part of a pattern of harassment (as opposed to a discrete, separate event). See Defendant's S/J Reply at 1-2.

The instant complaint was filed on November 18, 2003. See Docket. Thus, to reel in the earlier incidents, Azimi must demonstrate that at least one act occurred on or after November 18, 2001 that contributed to the alleged hostile work environment. He fails to do so. First, while he adduces evidence that some hostile workplace acts occurred after tormenter George Libby left the Portland plant (e.g., the incidents in which pork was stuffed in his jacket pocket and his shoes were placed in a toilet), he adduces no cognizable evidence of precise dates of those later incidents. While the record must be viewed in the light most favorable to Azimi, it stretches the bounds of "reasonable inference" for the court simply to infer that at least one of these incidents took place within the limitations period.

Second, while Azimi's discharge itself clearly did take place within the limitations period, I agree with Jordan's that he falls short of establishing a nexus between that event and the prior pattern of abuse. There is, for example, no evidence that any decision maker involved in Azimi's termination engaged in or was influenced by the prior abuse, or that the termination itself otherwise bore any resemblance to the prior pattern of incidents. Thus, on this record, Jordan's correctly characterizes the termination as a "discrete" incident that cannot serve to anchor the prior claimed hostile-workenvironment incidents. See, e.g., Morgan, 536 U.S. at 114-15 ("Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice. Morgan can only file a charge to cover discrete acts that occurred within the

appropriate time period.. . . Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.") (footnote and internal quotation marks omitted); Patterson v. County of Oneida, NY, 375 F.3d 206, 220 (2d Cir. 2004) ("[T]he only allegedly discriminatory act of which Patterson complained that occurred within the 300-day period was the termination of his employment on February 9, 1999. Patterson proffered no evidence to show that the termination, even if discriminatory, was in furtherance of the alleged practice of racial harassment. Accordingly, the district court properly dismissed all of Patterson's Title VII claims of hostile work environment as untimely."); Lucas v. Chicago Transit Auth., 367 F.3d 714, 727 (7th Cir. 2004) ("We have stated that the concept of cumulation suggests a critical limiting principle. Acts so discrete in time or circumstances that they do not reinforce each other cannot reasonably be linked together into a single chain, a single course of conduct, to defeat the statute of limitations.") (citations and internal punctuation omitted) (emphasis in original).

Jordan's accordingly demonstrates its entitlement to summary judgment, on statute-oflimitations grounds, with respect to that portion of Count III (Azimi's MHRA claim) concerning alleged pre-termination conduct.[9]

B. Failure To Comply With Administrative Notice, Filing Requirements

Jordan's next contends that, for purposes of Azimi's Title VII claim (Count II), none of the incidents described in Azimi's second and third complaints to the

MHRC are cognizable inasmuch as (i) the second complaint apparently was not filed with the EEOC, and (ii) the EEOC issued a right-to sue letter covering only the incidents detailed in the first of Azimi's MHRC complaints. See Defendant's S/J Motion at 5-6 (citing 42 U.S.C. § 2000e-5(f)). As the First Circuit has observed:

Title VII requires, as a predicate to a civil action, that the complainant first file an administrative charge with the EEOC within a specified and relatively short time period (usually 180 or 300 days) after the discrimination complained of, 42 U.S.C. § 2000e-5(e)(1), and that the lawsuit be brought within an even shorter period (90 days) after notice that the administrative charge is dismissed or after the agency instead issues a right-to-sue letter, id. § 2000e-5(f)(1). Despite occasional references to "jurisdiction," this is basically an exhaustion requirement coupled with a short statute of limitations both on complaining to the agency and on fling the subsequent court case.

Clockedile v. New Hampshire Dep't of Corr., 245 F.3d 1, 3-4 (1 st Cir. 2001).

Azimi adduces no evidence that he has received an EEOC right-to-sue letter covering his third complaint, entitling Jordan's to summary judgment with respect to Count II to the extent that Azimi alleges discrimination based on termination of employment. See Plaintiffs S/J Opposition at 3-5 & n.3. However, Azimi points out (and adduces evidence) that his first and second complaints were consolidated at the MHRC level and that the EEOC's October 28, 2003 right-to-sue letter accordingly reasonably is construed as pertaining to that entire consolidated complaint. Thus, the events

described in both the first and second of Azimi's MHRC complaints are cognizable for purposes of Azimi's Title VII claim (Count II).

C. Azimi's Termination

Jordan's finally contends that, for purposes of all three counts of the Complaint, Azimi fails to generate a triable issue as to the lawfulness of his discharge inasmuch as (i) although Azimi consistently has denied any wrongdoing, Jordan's investigation unearthed substantial evidence that he had engaged in serious misconduct, (ii) Jordan's decision makers honestly believed he had engaged in such misconduct, (iii) he was in fact discharged for that misconduct, and (iv) Azimi has no evidence to prove that Jordan's explanation was a pretext for unlawful discrimination or that the true reason for his discharge was unlawful retaliation or other unlawful discrimination. See Defendant's S/J Motion at 67.

Jordan's argument alludes to the so-called McDonnell Douglas burden-shifting test devised by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973). As the First Circuit has explained:

The essence of McDonnell Douglas is a tripartite regimen. The plaintiff must first prove the prima facie case for retaliatory [or other unlawful] discharge. Thereafter, the defendant must rebut the presumption created by the prima facie case by producing a legitimate nondiscriminatory reason for the employer's action. Once the defendant meets this burden, the trier of fact proceeds to the ultimate question: whether plaintiff has proved that the defendant intentionally

discriminated against the plaintiff on the basis of the plaintiff s protected characteristic or action. The plaintiff must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a discriminatory decision.

White v. New Hampshire Dep't of Corr., 221 F.3d 254, 264 (1 st Cir. 2000) (citations and internal punctuation omitted).

Jordan's does not argue that Azimi fails to make out a prima facie case of retaliatory or discriminatory discharge. See Defendant's S/J Motion at 6-7.[10] Rather, it contends that Azimi's case falls apart at the third and final stage of the McDonnell Douglas analysis inasmuch as he adduces no evidence that his firing was either pretextual or motivated by retaliatory or discriminatory animus. See id. Azimi rejoins that (i) Jordan's itself acknowledges that he has consistently denied any wrongdoing that could have justified his termination - a denial that, in his view, constitutes evidence of pretext, (ii) a showing of pretext alone suffices to stave off summary judgment, and (iii) in any event, in addition to showing pretext, he bolsters his case with evidence of ongoing workplace harassment and the temporal proximity of his discharge to his MHRC flings. See Plaintiffs S/J Opposition at 5-9.
Jordan's has the better of this argument. A "nonmoving plaintiff may demonstrate pretext either indirectly by showing that the employer's stated reasons for its adverse action were not credible, or directly by showing that that action was more likely motivated by a discriminatory reason." Hodgens v. General Dynamics Corp., 144 F.3d 151,168 (1st Cir.1998). "Thus, one way

an employee may succeed is to show such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfnder could rationally find them unworthy of credence and ... infer that the employer did not act for the asserted non-discriminatory reasons." Id. (citations and internal quotation marks omitted).

As discussed above in the context of recitation of the cognizable facts, Azimi impermissibly relies on conclusory statements that Jordan's reasons for his discharge were false and discriminatory. See Plaintiffs Additional SMF Par. 42. In any event, in support of those propositions, he cites to a portion of his deposition testimony in which he denied the underlying wrongdoing. See id. Such a denial does not in itself generate a trialworthy issue that an employer's proffered justification for a termination is unworthy of credence. See, e.g., Rivera-Aponte v. Restaurant Metropol #3, Inc., 338 F.3d 9, 11-12 (1st Cir. 2003) ("Whether a termination decision was wise or done in haste is irrelevant, so long as the decision was not made with discriminatory animus. Rivera's bare assertion that Metropol's reason for terminating him was pretext is insufficient[.]"); Billups v. Methodist Hosp. of Chicago, 922 F.2d 1300, 1303 (7th Cir.1991) ("Initially, plaintiff argued that she denied all the allegations of abuse and that she had a good work record prior to the alleged incidents. Billups' own self-serving remarks standing alone are insufficient to raise doubt as to the credence of the employer's explanation for termination."); Davis, 2003 WL 21488523, at *7 ("It is the perception of the decision maker which is relevant, not the self assessment of the plaintiff.").

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000), on which Azimi relies for the proposition that his denial of underlying wrongdoing alone is enough to show pretext, see Plaintiff s S/J Opposition at 5-7, is distinguishable. The plaintiff in Reeves produced evidence apart from mere self assessment to show that the employer's explanation for his discharge was false. See Reeves, 530 U.S. at 144-45 (noting that plaintiff made "substantial showing" that employer's explanation for discharge (which included asserted falsification of company pay records) was false when, inter alia, he and fellow mid-level supervisor testified, and one of the decision makers in plaintiffs discharge conceded, that company's automated time clock sometimes failed to scan employees' timecards, as a result of which mid-level supervisors made certain entries on timesheets).

Nor does Azimi's evidence of a pattern of workplace harassment suffice to raise a trialworthy issue whether he was discharged on the basis of retaliatory or discriminatory animus. Azimi proffers no cognizable evidence from which one reasonably could infer that those involved in the prior harassment either made or influenced the decision to terminate his employment or that the decision makers otherwise shared the harassers' biases. See, e.g., Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 85 (1st Cir. 2004) ("[T]he biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case[.]") (citation and internal quotation marks omitted) (emphasis in original).

Nor, finally, could a trier of fact reasonably infer retaliatory discharge on the basis of temporal proximity. Azimi was terminated on November 19, 2001, nearly fourteen months after he fled his first complaint (on September 25, 2000) and approximately nine months after he filed his second (on February 12, 2001). That is too great a gap to raise a reasonable inference of retaliatory discharge based on timing alone. See, e.g., Bones v. Honeywell Int'l, Inc., 366 F.3d 869, 879 (10th Cir. 2004) ("Ten months is too long a time lapse, standing alone, to support an inference of a causal connection between Bones' alleged disability and her termination."); Bishop v. Bell Atl. Corp., 299 F.3d 53, 60 (1 st Cir. 2002) ("[1] f temporal proximity is the only evidence of causality establishing prima facie retaliation, proximity must be very close; twenty months is insufficient[.]") (citation and internal quotation marks omitted); Paquin v. MBNA Mktg. Sys., Inc., 233 F. Supp.2d 58, 68 (D.Me. 2002) ("While Plaintiff complained in October 1999, MBNA terminated her employment in May 2000. Without more, a span of approximately seven months is too long to reasonably infer that one event is causally related to the other.").

For all of the foregoing reasons, Azimi fails to generate a trialworthy issue as to whether his discharge from employment on November 19, 2001 was retaliatory or discriminatory. Accordingly, Jordan's is entitled to summary judgment with respect to claims of retaliatory or discriminatory discharge asserted in all three counts of the Complaint.

IV. Conclusion

For the foregoing reasons, I recommend that Jordan's motion for summary judgment be GRANTED as to Counts I and II to the extent encompassing claimed unlawful termination only, GRANTED as to Count III in its entirety, and otherwise DENIED. If this recommended decision is adopted, remaining for trial will be Azimi's section 1981 (Count I) and Title VII (Count II) claims to the extent predicated on alleged pre-termination conduct only.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S. C. § 636(b) (1) (B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 7th day of October, 2004.

s/ David M. Cohen David M. Cohen United States Magistrate Judge

Footnotes

[1] Jordan's submits no response to Azimi's statement of additional facts. See Docket. As a result, those additional facts are deemed admitted for purposes of summary judgment to the extent supported by record

citations in accordance with Local Rule 56. See Loc. R. 56(d)-(e). I have disregarded two of Azimi's statements in their entirety on the basis that they are unsupported by any citation whatsoever, see Plaintiff's Statement of Material Facts ("Plaintiff's Additional SMF"), commencing at page 3 of document titled Plaintiff's Opposing Statement of Material Facts ("Plaintiff s Opposing SMF") (Docket No. 13), 11t 3, 45, and six others in their entirety on the basis that they are unsupported by the citations given, see id. 11t 10, 12-13,15, 28, 39. 1 have also disregarded portions of a number of other statements by Azimi that are not fairly supported by the citations he has provided.

[2] Although the citation given does not support the assertion that Azimi began work at Jordan's "in November 1999," I include this background detail inasmuch as it is clear there is no underlying dispute with respect to it. See Complaint and Demand for Jury Trial (Docket No. 1) Par. 5; Answer (Docket No. 4) Par. 5.

[3] In paragraph 4 of Azimi's statement of additional facts and in many other paragraphs, plaintiff's counsel sets forth multiple-sentence statements followed by an en masse list of citations. See generally Plaintiffs Additional SMF. Plaintiffs counsel is cautioned that Local Rule 56 contemplates a series of separately numbered one-sentence statements. See, e.g., Loc. R. 56(c) ("The opposing statement may contain in a separately titled section additional facts, each set forth in a separately numbered paragraph[.]") (emphasis added). At the very least, counsel should provide record citations immediately following the sentence to which they pertain.

[4] Although in his statement of additional facts the plaintiff includes "Ryan" as Phil's last name, the cited material offers no support for that stated fact.

[5] Although Azimi states that this incident occurred approximately three to four days prior to his termination, see Plaintiff s Additional SMF Par. 41, that assertion is not supported by the citations given and is on that basis disregarded.

[6] Azimi also states that he was discharged on a "false" basis "[i]n retaliation for [his] charges of discrimination filed in the Maine Human Rights Commission and as a further act of discrimination." Plaintiff's Additional SMF Par. 42. These are conclusory statements of the sort that the First Circuit has made clear cannot stave off summary judgment. See, e.g., In re Schifano, 378 F.3d 60, 66 (1st Cir. 2004) ("The non-moving party must show more than conclusory allegations, improbable inferences or unsupported speculation to establish genuine issues of material fact. Competent evidence is required."). In any event, for these propositions Azimi relies on citation to a portion of his deposition testimony in which he denied that he engaged in the underlying wrongdoing. See Plaintiff's Additional SMF Par. 42; Azimi Dep. at 249-64. Such a denial does not, in itself, tend to show that an employer's explanation for a discharge was "false" in the sense that it was pretextual, or that the true reason for the discharge was retaliation or discrimination. See, e.g., Davis v. Seven Seventeen HB Philadelphia Corp. No. 2, No. Civ.1:02CV00332, 2003 WL 21488523, at *7 (M.D.N.C. June 20, 2003) ("It is the perception of the decision maker which is relevant, not the self assessment of the plaintiff. Thus, when an employer gives a reason for discharging an employee, it is not the Court's province to decide whether the reason was wise, fair, or even

correct, so long as it truly was the reason for the employer's action. Accordingly, it is not enough for a plaintiff to show that the discharge was based on groundless complaints, or that the employee did not, in fact, violate company rules prior to the discharge. Similarly, it is not enough to dispute the correctness of the outcome of investigations into misconduct.") (citations and internal punctuation omitted).

Jordan's contends that (i) although Azimi consistently has denied any and all wrongdoing in connection with November 2001 incidents involving co-workers Harry Adams and Mercedes Manning, its investigation at that time showed substantial evidence that he had engaged in serious misconduct, (ii) its decisionmakers in fact honestly believed he had engaged in such misconduct, (ii) he was discharged for that misconduct, and (iv) he has no evidence to prove Jordan's explanation was a pretext for unlawful discrimination. See Defendant's SMF 11t 3-6. Azimi denies all of these statements. See Plaintiff's Opposing SMF 11t 3-6. I assume arguendo that the materials Azimi cites effectively controvert these statements and disregard them on that basis inasmuch as nothing ultimately turns on their omission.

[8] Jordan's states that the first complaint and apparently the third were filed with the EEOC but that the second apparently was not and that Azimi never received a notice of right to sue on either the second or third complaint. See Defendant's SMF Par. 2; Smith Aff. Par. 3. However, Azimi effectively controverts this statement to the extent that he asserts that his first two complaints were consolidated as part of a complaint of a continuing violation, and the EEOC right-to-sue notice on that complaint was issued on October 28, 2003. See Plaintiff's Opposing SMF Par. 2; Investigator's Report § III(2); Suit Notice.

[9] As Azimi notes, the issue is academic in that pre-termination conduct is encompassed in Counts I and II. See Plaintiff s S/J Opposition at 2 n. 1.

[10]A plaintiff makes out a prima facie case of retaliatory discharge by showing "that (1) he engaged in protected conduct, (2) he was thereafter subjected to an adverse employment action, and (3) a causal connection existed between the protected conduct and the adverse action." Che v. Massachusetts Bay Transp. Auth., 342 F.3d 31, 38 (1st Cir. 2003). In similar vein, a plaintiff makes out a prima facie case for discharge based on animus against a protected status, such as race, religion or national origin, by demonstrating "that (1) he belonged to a protected class ... ; (2) he was performing his job at a level that rules out the possibility that he was fired for job performance; (3) he suffered an adverse job action by his employer; and (4) his employer sought a replacement for him with roughly equivalent qualifications." Benoit v. Technical Mfg. Corp., 331 F.3d 166, 173 (1st Cir. 2003). The initial burden of establishing a prima facie case "is not an onerous one[.]" Id.